Supreme Court, U.S.
FILED

99-1415 DEC 1 1999

No. _____
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROSS ADAMS,

Petitioner,

v.

DAVID & BARBARA DRISCOLL,
RUEL & PATRICIA GALBREATH,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Ross Adams
3691 Old Bald Mountain Road
Blairsville, Georgia 30512
(706) 745-3679
Fax: (706) 745-2320

QUESTIONS PRESENTED

Whether federal courts have jurisdiction over storm water discharge citizen suits under the clean water act in the absence of an applicable effluent standard or limitation promulgated by the EPA or EPD, to which the federal court can compart the discharge of storm water by the defendant.

Whether a plaintiff who shows only that he uses and enjoys a privately owned body of water upstream from a navigable water used by the public, and who makes no showing that he uses the public navigable water, and who makes no showing the sediments ever reaches a body of water used by the public, has standing to bring a citizen's suit under the clean water act.

Whether it is fair for a person to file suit against another person on behalf of the United States of America and the defendant be found guilty without having a jury trial.

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United States Constitution Article III, section 2, clause 3

United States Constitution Article VII

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ross Adams, respectfully petitions this Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the 11th Circuit in this case.

OPINIONS BELOW

The opinion of The United States Court of Appeals is reported in Appendix A. The opinion of The United States District Court is reported in Appendix B.

JURISDICTION

The court of appeals entered its judgment on July 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

The Clean Water Act

STATEMENT OF THE CASE

Toward the end of 1994, the petitioner used money he obtained through a bank loan to purchase 76 acres of land in Union County, State of Georgia. Union County is the petitioner's county of residence. The petitioner contracted with a timber-harvesting company called Sparks Lumber Company to harvest the saw timber off this

property. At some point during the operation, Sparks Lumber Company hired a man named Bobby Thomas to build roads to transport the harvested timber away from the 76-acre location. At the end of November 1995, Sparks Lumber Company ended its timber-harvesting operation on the land.

After Sparks Lumber Company completed its timber-harvesting operation, the petitioner hired a man named Emory Brackett to slash cut the remaining timber. This process went on until June of 1996. All land disturbing activities were done during the forestry operations.

The petitioner continues to maintain a county-approved sedimentation and erosion control plan on the land in question. No legal action or fines have ever been imposed by any county, state, or federal governmental agencies for his land development activities.

However, David Driscoll and Barbara Driscoll, residents of Florida, filed suit against the petitioner, alleging that he had violated the Clean Water Act. Donald Stacks, an attorney specializing in environmental law, represented the Driscoll's.

The Driscoll's own a vacation home below the petitioner's land. They have a small pond beside the vacation home. The stream that feeds this pond originates from a mountain spring on the petitioner's land. While Sparks Lumber Company built roads on the petitioner's land in 1994-1995, silt washed down from the petitioner's land and accumulated in the Driscoll's pond.

When the petitioner discovered that the Driscoll's were unhappy with the accumulation of silt in their pond, he offered to repair the pond.

The Driscoll's refused the petition's offer and filed suit. Ruel and Patricia Galbreath, who own land used for vacationing that adjoins the Driscoll's property, filed suit in conjunction with the Driscoll's. The pond on the Galbreath's property is fed by the water runoff from the Driscoll's pond.

The question at hand is whether the petitioner violated the Clean Water Act. Opinions are conflicting. In The United States District Court, Judge O'Kelley ruled in favor of Adams, in accordance with the magistrate court opinion. In The United States Court of Appeals, Judge Ed Carnes ruled in favor of the Driscoll's and Galbreath's.

The petitioner has not received a trial by jury in this case, despite his efforts to procure one. However, this right is afforded him by The United States Constitution.

Article III, section 2, clause 3 of the United States Constitution states: "The trial of all crimes, except in cases of impeachment, shall be by jury, and such a trial shall be held in the state where the crimes shall have been committed. . ."

Article VII of the United States Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Donald Stacks, council for the Driscoll's and the Galbreath's, cites several cases in his brief that are totally irrelevant in this case. In fact, most of the precedents he cites apply to the discharge of

chemical waste by factories, not the washing of natural sediment into a pond. The discharge of chemical waste into streams, rivers, and oceans is of great concern, but one cannot equate natural sediment (dirt) to the deliberate discharge of man-made chemical waste. The ridiculous nature of this case merits it be thrown out of court.

The petitioner has always been and continues to be, sensitive to the need for environmental law. The plethora of environmental issues that confront us-deforestation, air pollution, acid rain, water pollution, among many others-certainly need our immediate attention. But to misapply the laws we have put in place to remedy environmental problems further retards our efforts to improve our situation. The purpose of environmental law is to procure a safe, cleaner environment for ourselves and our children, not to allow one human being to unjustly take from another. Environmental law should never be used to allow a plaintiff to capitalize on the assets of others. With a large monetary award, the Driscoll's and the Galbreath's will certainly capitalize on the petitioner's assets, and set a precedent for more lawsuits similar to this one in the future.

REASONS FOR GRANTING THE PETITION

A Supreme Court ruling regarding the interpretation of The Clean Water Act would help mediate contradictory judgments by lower courts, as exemplified in this case.

Any action by the Supreme Court would aid county, state, and federal officials in interpreting and enforcing The Clean Water Act in its proper form. Present circumstances merit such a ruling, since there is much confusion among authorities as to how the law should

be interpreted.

The need for environmental law is great, but the need to enforce it properly is even greater. As this case exemplifies, some will try to capitalize on the assets of others, not in the sense of improving the conditions for which laws are made, but for personal financial gain.

Lower courts should not consider disputable facts without a trial, especially when there is so much to lose in terms of reputation and money. The petitioner works for no large corporation; he does not have several million dollars to hire a team of attorneys to represent him, nor does he have a large amount of cash on hand to pay court fees and settlements.

There is much to be reconciled in this case, in the interest of truth. There are witnesses who have not yet testified, as well as photographs and other evidence not yet seen by a judge.

In the interest of justice, the petitioner respectfully requests a trial by jury before he loses the ability to support his family.

CONCLUSION

The petitioner was granted a motion to dismiss, in the United States Federal District Court, Northern District of Georgia. At the United States Federal District Court, the Driscoll and Galbreath motion for summary judgement was denied.

The plaintiffs appealed this decision to the 11th Circuit Court of Appeals. As a result, both decisions of the lower courts were re-

versed and a ruling was entered against the petitioner.

In the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ross Adams

APPENDIX A
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn

In Replying Give Number
Of Case And Names of Parties

July 23, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-8532-CC Driscoll v. Adams
DC DKT NO.: 96-00175 2-CV-WCO

Enclosed is a copy of the court's decision filed today in this appeal. Judgement has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern cost, petitions for rehearing and mandate respectively.

To be timely, a petition for rehearing or for rehearing a suggestion of en banc consideration must be received in the clerk's office within twenty-one (21) days of the date of this opinion and judgement, except that: in **CIVIL** cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be **FORTY-FIVE (45 DAYS)** after entry of judgment. See Fed.R.App.P.40(a). No additional time for service by mail is permitted. See 11th Cir.R. 40-2.

If attorney's fees on appeal are authorized by law they must be sought

by filing a petition for attorney's fees with this office within fourteen (14) days of the date of this letter. Davidson v. City of Avon Park, 848 F.2d 172, 174 n.4 (11th Cir., 1998).

Pursuant to Fed.R.App.P.39,

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Nancy Gilman (404) 335-6151

Encl.

OPIN-1A (1-1999) [PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-8532

D. C. Docket No. 2:26-CV-175-WCO

DAVID & BARBARA DRISCOLL, and
RUEL & PATRICIA GALBREATH,

Plaintiffs-Appellants,

versus

ROSS ADAMS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(July 23, 1999)

Before EDMONDSON and CARNES, Circuit Judges, and WATSON*, Senior Judge.

CARNES, Circuit Judge:

*Honorable James L. Watson, Senior Judge for the U.S. Court of International Trade, sitting by designation.

Plaintiffs David and Barbara Driscoll and Ruel and Patricia Galbreath appeal the district court's award of summary judgement to defendant Ross Adams on their Clean Water Act claim, which arose out of Adams' discharge of allegedly polluted storm water into a stream running from his property to ponds on their properties. Adams argues that the district court was correct in concluding that he is not subject to liability under the Clean Water Act because the Act imposed an impossible condition by requiring him to obtain a discharge permit that was unavailable in the state of Georgia. He also maintains that his discharge falls outside the scope of the Act because it was not a point source discharge of pollutant into a navigable water as defined by the Act. We reject both of those arguments and reverse the district court's grant of summary judgement.

I. FACTS AND PROCEDURAL HISTORY

At all times relevant to this case, Adams owned 76 acres of land in the North Georgia mountains. David and Barbara Driscoll owned approximately five acres adjacent to Adams' property, and Ruel and Patricia Galbreath owned about two acres adjacent to the Driscoll's property. The Spiva Branch stream flows downhill from Adams' property through a pond on the Driscoll's property and then through another pond on the Galbreath's property, before merging with the Nottely River, which flows across the Georgia-Tennessee border and unites with the Tennessee River. The Driscoll's and Galbreath's claim in their complaint, and the magistrate judge found, that storm water washed mud, silt, sand, and other materials from Adams' property into the Spiva Branch stream and thence into the plaintiffs' two ponds, while Adams was harvesting timber and developing his property.

Adams harvested timber on his property from March, 1995 to November, 1995. During the harvest, he cut and graded roads, installed storm pipes, and cut and removed timber. Adams then proceeded to develop the property, putting gravel on the roads, building culverts and check dams to channel the storm water runoff, and dividing the property into residential lots for vacation homes. The harvest and development caused erosion of mud, sand, and other materials on his property. Adams concedes that he did little to stabilize his property or prevent erosion until the spring of 1996, after the erosion had already caused a considerable amount of damage to the plaintiffs' properties. He says his delay in taking preventative measures was the result of inclement weather and winter cold.

Adams failed to seek the proper approval from any federal, state, or local government agency before starting work on his property. After all of the timber harvest and much of the development were

already completed, he filed for the required state permit in September 1996. He did not obtain a county development permit until February 1997, two months after the filing of the complaint in this lawsuit. As for federal law requirements, Adams never obtained a National Pollutant Discharge Elimination System ("NPDES") permit, which is required for lawful pollutant discharge under the Clean Water Act. The parties agree that an NPDES general storm water permit was not available because of a legal challenge to the permit. The plaintiffs contend, however, that other NPDES permits were available, including an individual storm water permit and both general and individual point source discharge permits.

The plaintiffs filed this lawsuit in December 1996 against Adams for violations of the Clean Water Act, 33 U.S.C. 1251-1376 (1994), pursuant to its citizen suit provision, 33 U.S.C. 1365. They also included in their complaint pendent state law claims for nuisance, trespass, negligence, among other things. They filed a motion for summary judgment, and Adams filed a motion to dismiss, which the district court treated as a cross motion for summary judgement. The court denied the plaintiffs' motion and granted Adams', stating that the requirement of an "NPDES permit was an impossible condition . . . [and] [t]here were no approved federal standards for how much sand, silt and mud could be in the released water." After disposing of the federal law claim, the court declined to retain supplemental jurisdiction over the state law claims and dismissed them without reaching the merits. The plaintiffs appealed.

We review de novo the district court's award of summary judgment. See B.R.L. Equip. Rentals Ltd. v. Seabring Marine Indus., Inc., 168 F.3d 413, 415 (11th Cir. 1999). We also review de novo the district court's conclusions' of law. See Brooks v. Miller, 158 F.3d 1230, 1236 (11th Cir. 1998).

II. DISCUSSION

Adams raises essentially two issues on appeal. First, he argues that the Clean Water Act's prohibition on pollutant discharge does not apply where the NPDES permit required to make the discharge lawful under the Act is not available. Second, he contents that his discharges in this case did not fall within the scope of prohibited pollutant discharges under the Act. We will address each contention in turn.

A. DOES THE CLEAN WATER ACT'S PROHIBITION ON "THE DISCHARGE OF ANY POLLUTANT BY ANY PERSON" APPLY WHERE THE NPDES PERMITS REQUIRED FOR LAWFUL DISCHARGE IS NOT AVAILABLE?

The Clean Water Act provides, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 22 U.S.C. 1311(a). Of the excepted sections, the only one potentially applicable in this case is 1342, which establishes the National Pollutant Discharge Elimination System and authorizes the Administrator of the EPA to issue permits under this system that allow the permit holder to discharge limited quantities of pollutants under prescribed conditions. See 33 U.S.C. 1342(a)(1). If the Administrator approves a state's permit program, the state may assume control of NPDES permitting for that jurisdiction. See 33 U.S.C. 1342(b).

Georgia has an approved state NPDES permit program. Pursuant to that program, the Georgia Environmental Protection Division ("EPD") has attempted several times over the past few years to issue a general NPDES storm water discharge permit. Unlike an indi-

vidual permit, which would apply to an individual discharger, the general permit would apply to an entire class of dischargers. To obtain coverage under a general permit, a would-be discharger could file a Notice of Intent form with the EPD. The EPD has been unable to implement any of its proposed general storm water permits because of court challenges brought by concerned citizens. Thus, the general NPDES storm water discharge permit is not and never has been available.

The plaintiffs argued in their briefs to us that although the general storm water discharge permit was not available to Adams, other acceptable NPDES permits, including an individual storm water discharge permit and other general and individual point source discharge permits, were available. Their counsel conceded at oral argument, however, that nothing in the record supports their contention that the EPD had ever actually issued any individual NPDES storm water discharge permits in Georgia. The record is equally devoid of any evidence suggesting that other general of individual NPDES point source discharge permits for storm water discharge were being issued in Georgia.

Thus, the issue in this case is whether 1311(a)'s zero-discharge standard applies to a discharger who could not obtain a NPDES permit because none was available. The Court has previously addressed the implications of unavailable NPDES permit under the Clean Water Act. We did so in Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), where the plaintiff sued developer JMS under the Clean Water Act for discharging storm water without an NPDES permit. See Hughey, 78 F.3d at 1524. The discharge was minimal, because JMS had implemented state-of-the-art sedimentation control devices in accordance with all state and local requirements. See id. at 1526. JMS had not obtained the required NPDES permit, how-

ever, because it was not available from the Georgia EPD. See id, at 1525.

In order to determine whether JMS had violated the Clean Water Act, we began our analysis with the text of the Act, concluding that "[t]he amended CWA absolutely prohibits the discharge of any pollutant by any person, unless the discharge is made according to the terms of [an NPDES] permit." See id. at 1524. But our commitment to the plain language of the Act was tempered by the well-established canon that "Congress is presumed not to have intended absurd (impossible) results." Id. at 1529. In an effort to strike a balance, we established a narrow exception to the general rule of liability for discharges without an NPDES permit where: 1) compliance with the zero-discharge standard was factually impossible because there would always be some storm water runoff from an area of development; 2) there was no NPDES permit available to cover such discharge; 3) the discharger was in good-faith compliance with local pollution control requirements, which substantially mirrored the proposed NPDES discharge standards; and 4) the discharges were minimal. See id. at 1530. Thus, while acknowledging the Clean Water Act's zero-discharge standard, the Hughey decision, in light of the material facts of that case, recognizes a narrow exception to that standard for any minimal discharge that occurs despite a developer's best efforts to reduce the amount of it and comply with applicable law. See id. We make it clear that all four of the elements were essential to the exception. See id.

Two of the Hughey elements are lacking in this case. First, unlike the discharger in Hughey, who had "made every good-faith effort to comply with the Clean Water Act and all other relevant pollution control standards" by implementing pollution-control measures and obtaining local permits, id., in this case Adams did little or noth-

ing to limit erosion or storm water discharge before beginning construction. He sought none of the required permits until after considerable damage has been done to the Driscoll's and Galbreath's properties. Second, we emphasized in Hughey that "[t]he facts of this case necessarily limit our holding to situations in which the storm water discharge is minimal, as it was here." Id. By contrast, in this case the amount of Adams' storm water discharge and the resulting damages were substantial. Indeed, the plaintiffs proffered evidence indicating that approximately 64 tons of sediment were deposited into their ponds as a result of Adams' activities. The factual disparities between Hughey and this case compel the conclusion that the exception recognized in Hughey does not apply here.

Adams argues that even if the Hughey exception does not apply, the Clean Water Act should not be interpreted to impose a default zero-discharge standard where no NPDES permit is available. He contends, in essence, that if the Act is interpreted as requiring a discharge permit which cannot be obtained, then the law requires an impossibility, with the net result being there is no restriction on his right to discharge. That contention is inconsistent with the Hughey opinion and our understanding of the law.

We agree with Hughey that, but for the limited exception recognized in that case, "[t]he amended CWA absolutely prohibits the discharge of any pollutant by any person, unless the discharge is made according to the terms of [an NPDES] permit." Id. at 1524. That decision staked out a path developers wishing to avoid liability can follow where no permit is available and where it would otherwise be impossible to develop their land without causing some discharge: the developer must be in good faith compliance with all state and local requirements prior to any discharge and must reduce the discharge to a minimum. See id. at 1530. Because it is feasible for

a developer to take the steps required to qualify for the Hughey exception - after all, the developer in that case took them - Adams' impossibility argument fails.

We note that our readings in Hughey of the Clean Water Act as prohibiting (with one narrow exception) all discharges without a permit is consistent with the Fifth Circuit decision published almost contemporaneously with Hughey. In Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F.3d 546 (5th Cir. 1996), the Sierra Club sued Cedar Point Oil under the citizen suit provision of the Clean Water Act, alleging that Cedar Point's discharges of produced water (a by-product of oil and gas drilling which consists of water and chemicals used in the drilling process) into Galveston Bay without an NPDES permit violated the Clean Water Act. See Sierra Club, Lone Star Chapter, 73 F3d at 550-51. The EPA had never issued a permit for produced water discharges or promulgated specific effluent limitations for the "Coastal Subcategory" of oil and gas producers, to which Cedar Point belonged. See id. at 552-53. Cedar Point argued that because of the EPA's failure in that regard, it could not be liable for violating the Clean Water Act. See id, at 559.

The Fifth Circuit rejected Cedar Point's position. Like we did in Hughey, the Fifth Circuit observed that the plain language of the Clean Water Act imposes liability for discharges without a permit and facially admits of no exception where the required permit is not available. See id. The court went on to examine the legislative history of the Act, concluding that the history supported its interpretation of the text. The court stated:

> We agree with Cedar Point that Congress initially intended that a citizen suit based on a violation of 1311(a) for discharging

> pollutants without a permit would only lie where EPA had issued a relevant effluent limitation or permit; that is, where the defendant was discharging pollutants without a permit because he had failed to obtain a permit that was available, rather than because EPA had failed to issue such permits. This intent is clearly established by the inclusion of particular dates in the statute, as explained by the legislative history.

Id. at 559-60. The court determined, however, that Congress did not intend for the unavailability of an NPDES permit to excuse discharges indefinitely. Congress provided that the citizen suit provision would become effective almost nine months after enactment of the Clean Water Act, in order to allow "sufficient time . . . for the State and Federal governments to develop fully, and execute the authority contained in [1342, which provides for NPDES permits]." Id. at 560 & n.27 (quoting S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971)) (emphasis omitted). Because that effective date and others have long since passed, and Congress has not postponed them or placed any other restrictions on bringing suit, the court concluded it would defeat Congressional intent to extend those dates indefinitely. See id. at 560-61.

The Fifth Circuit's decision in Sierra Club, Lone Star Chapter reinforces our interpretation of the Clean Water Act in Hughey. For the reasons set forth in those two decisions, we reject Adams' position that the Clean Water Act's zero-discharge standard does not apply where the required NPDES permit is not available. We decline to extend the narrow exception recognized in Hughey to cover the circumstances presented in this case.

B. DID ADAMS' DISCHARGES FALL WITHIN THE SCOPE OF PROHIBITED POLLUTANT DISCHARGES UNDER THE CLEAN WATER ACT?

Adams also contends that this court should affirm the district court's award of summary judgment to him for two additional reasons. First, he argues that the materials he discharged into the Spiva Branch stream was not a "pollutant" under the Clean Water Act. Second, he contends there was no "discharge of pollutant" within the meaning of the Act, both because the storm water runoff did not come from a "point source," and because the Spiva Branch stream, being a small-volume stream that flows only intermittently, is not navigable water. These two contentions are without merit.

As to the first one, the definition of "pollutant" in the Act is broad, including, among other things, "rock, sand, cellular dirt and industrial, municipal, and agricultural waste. . . . " 40 C.F.R. 122.2. Sand and silt were two of the primary constituents of the sediment deposited in the plaintiffs' ponds as a result of the runoff from Adams' property. Moreover, the Hughey court specifically held that "[w]hen rain water flows from a site where land disturbing activities have been conducted, such grading and clearing, it falls within the description." Hughey, 78 F.3d at 1525 n.1.

As to Adams' second contention, a "point source" includes "any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit" and so on. 40 C.F.R. 122.2. here, it is undisputed that Adams collected storm water by pipes and other means, and that the storm water, was discharged into the stream. Furthermore, the Spiva Branch stream is a "navigable water" within the meaning of the Act. In United States v. Eidson, 108 F.3d 1336 (11th Cir. 1997), we described the expansive reach of

the term "navigable waters" as follows:

> The CWA [Clean Water Act] defines "navigable waters" as "waters of the United States, including territorial seas." 33 U.S.C. 1362(7). This broad definition "makes it clear that the term 'navigable' as used in the Act is of limited import" and that with the CWA Congress chose to regulate waters that would to be deemed navigable under the classical understanding of that term. . . . Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States" under 1362(7). Likewise, there is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently.

Eidson, 108 F.3d at 1341-42 (holding that a man-made drainage ditch was a navigable water under the Clean Water Act) (citations omitted). Thus, the Spiva Branch stream is a "navigable water" under the Clean Water Act, even if it flows only intermittently.

III. CONCLUSION

We REVERSE both the district court's award of summary judgment to Adams and the denial of summary judgment to the plaintiffs on the Clean Water Act claim, VACATE the district court's dismissal of the state law claims, and REMAND for further proceedings consistent with this opinion.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number Of Case And Names of Parties

September 17, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-8532-CC Driscoll v. Adams
DC DKT NO.: 96-001-75 2-CV-WCO

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Karen Turner/ck (404) 335-6172

Enc

REHG-1 (1-1999)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8532-CC

DAVID DRISCOLL, BARBARA DRISCOLL,
RUEL GALBREATH, and PATRICIA GALBREATH,
Plaintiffs-Counter-Defendants-Appellants,

versus

ROSS ADAMS,
Defendant-Counter-Claimant-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____F.2d_____).

Before: EDMONDSON AND CARNES, Circuit Judges, and WATSON*, Senior Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATE CIRCUIT JUDGE

ORD-42(6/95)

*Honorable James L. Watson, Senior Judge for the U.S. Court of International Trade, sitting by designation.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

DAVID and BARBARA DRISCOLL	:	
RUEL and PATRICIA GALBREATH	:	CIVIL ACTION NO.
	:	2:96-cv-175-WCO
Plaintiffs	:	
	:	
ROSS ADAMS	:	

Defendant :

:

:

JUDGMENT

This action having come before the court, Honorable William C. O'Kelley, Senior United States District Judge, for consideration of magistrate's report and recommendation, and the Court having adopted the report and recommendation as the order of the Court DENYING plaintiffs' motion for summary judgment and GRANTING defendant's motion for summary judgment, it is

ORDERED AND ADJUDGED that the plaintiffs, David and Barbara Driscoll and Ruel and Patricia Galbreath, recover nothing of the defendant, **ROSS ADAMS**, that the action be dismissed and that the defendant recover of the plaintiffs costs of this action.

Dated at Gainesville, Georgia, this 30th day of March, 1998.

LUTHER D. THOMAS, CLERK
By: _____
Deputy Clerk

Filed & entered in Clerk's Office
This 30th day of March, 1998.
LUTHER D THOMAS, CLERK
By:_____
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

DAVID and BARBARA DRISCOLL	:	
RUEL and PATRICIA GALBREATH	:	CIVIL ACTION NO.
	:	2:96-cv-175-WCO
Plaintiffs	:	
	:	
ROSS ADAMS	:	
	:	
Defendant	:	
	:	

ORDER

The captioned case is before the court for consideration of the magistrate judge's report and recommendation [50-1]. The report and recommendation was filed on February 10, 1998. The magistrate judge recommends that the plaintiffs' motion for summary judgment be denied [32-1] and defendant's motion to dismiss, treated herein as a motion for summary judgment, be granted [21-1]. Plaintiffs filed objections to the report and recommendation on February 20, 1998. The court heard oral argument on the pending motions on March 23, 1998.

This case arises out of construction activities undertaken by defendant on defendant's property. Plaintiffs sued defendant alleging violations of the Federal Clean Water Act (CWA) as well as various state law claims. The magistrate judge recommends that plaintiffs' claim under CWA be dismissed pursuant to Hughey v. JMS Development Corp., 78, F.3d 1523 (11th Cir. 1996). The magistrate judge

further recommends that plaintiffs' state law claims be dismissed for lack of jurisdiction. See Faucher v. Rodziewicz, 891 F.2d 864 (11th Cir. 1990). This court agrees.

After careful review of plaintiffs' objections, the court is satisfied that the magistrate judge's report and recommendation is accurate as a matter of law and fact. Accordingly, the court hereby ADOPTS the report and recommendation as the order of this court [50-1]. Plaintiffs' motion for summary judgment is hereby DENIED [32-1]. Defendant's motion to dismiss, treated herein as a cross motion for summary judgment, is hereby GRANTED [21-1].

IT IS SO ORDERED this 25th day of March, 1998.

WILLIAM C. O'KELLEY
Senior United States District Judge

Supreme Court, U.S.
FILED
APR 10 2000
CLERK

(2)

No. 99-1415

IN THE

Supreme Court of the United States

ROSS ADAMS,

Petitioner,

v.

DAVID & BARBARA DRISCOLL,
RUEL & PATRICIA GALBREATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals correctly applied the Clean Water Act's base effluent standard found in 33 U.S.C. § 1311 where Petitioner discharged a pollutant into waters of the United States without a permit.

Whether a perennial stream is waters of the United States under the Clean Water Act when it is a tributary of navigable waters.

Whether private citizens acting pursuant to the Clean Water Act's citizen suit provisions of 33 U.S.C. § 1365, are entitled to summary judgment on the issue of Petitioner's liability for the discharge of a pollutant into waters of the United States where there is no genuine dispute of fact.

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Courts Below

Respondents filed their Complaint in the Northern District of Georgia on December 18, 1996, challenging Petitioner's discharge of pollutants into waters of the United States and onto Respondents' properties. (R1-1). The Complaint alleged violations of the Federal Water Pollution Control Act, (hereinafter referred to as the "Clean Water Act"), 33 U.S.C. §§ 1311 and 1342, by Petitioner's discharge of pollutants into waters of the United States without a permit, as well as pendant state law claims for damages to Respondents' properties. (R1-1). Petitioner filed an Answer pro-se on February 10, 1997, (R1-3), including a counterclaim later dismissed by the Court upon Respondents' motion. (R1-4, R1-9).

After completion of discovery, on August 26, 1997, Petitioner filed a Motion to Dismiss Respondents' Clean Water Act claims. Respondents filed their Response Brief on September 11, 1997, (R1-24), and Petitioner filed his first Reply Brief five days later. (R1-29). Meanwhile, Respondents filed their Motion for Summary Judgment on their Clean Water Act claims as well as their pendant state law claims, (R1-32, R2-40, and R1-33), on September 25, 1997. On October 13, 1997, Petitioner filed a response which failed to offer any evidence or affidavits in response to Respondents' Motion for Summary Judgment. (R1-35).

On November 17, 1997, the District Court gave Petitioner a second opportunity to file a response to Respondents' Motion for Summary Judgment in order to submit evidence or affidavits in his favor. (R2-39-1).

The Court specified that Petitioner's Motion to Dismiss would be treated as a Motion for Summary Judgment. (R2-39-2). Thus, on November 26, 1997, the District Court allowed Respondents to file Supplemental Briefs in support of their Motion for Summary Judgment, (R2-44), and in Response to Petitioner's Motion to Dismiss. (R2-43).

Having now obtained legal counsel, Petitioner submitted his Response to Respondents' Motion for Summary Judgment and a second Reply Brief in Support of his Motion to Dismiss on December 10, 1997. (R2-46). Respondents filed their Reply Brief in support of their Motion for Summary Judgment on January 12, 1998. (R2-49).

On February 10, 1998, Magistrate John Strother, Jr. filed a Report and Recommendation on Petitioner's Motion to Dismiss/Motion for Summary Judgment and Respondents' Motion for Summary Judgment. (R2-50-2). The Magistrate Judge recommended that Petitioner's Motion to Dismiss/ Motion for Summary Judgment be granted, and that Respondents' Motion for Summary Judgment be denied. (R2-50-9). In accordance with the Report and Recommendation's prescribed procedure, Respondents filed their Objections to the Report and Recommendation with the District Court Judge on February 20, 1998, (R3-52), supplementing these objections with additional evidence on March 23, 1998. (R3-55). District Court Judge William O'Kelley heard oral arguments on Petitioner's Motion to Dismiss/Motion for Summary Judgment and Respondents' Motion for Summary Judgment on March 23, 1998. (R3-56). Shortly thereafter, the District Court adopted the Magistrate's Report and Recommendation as the final Order of the Court, thereby granting Petitioner's Motion to Dismiss/

Motion for Summary Judgment and denying Respondents' Motion for Summary Judgment on March 26, 1998. (R3-58-2). Judgment was entered in favor of Petitioner on March 30, 1998. (R3-59-1).

Respondents filed their Notice of Appeal to the Eleventh Circuit on April 24, 1998. (R3-60). After thorough and extensive briefing on all of the issues and oral arguments before a three judge Circuit Court panel, on July 23, 1999, the Eleventh Circuit issued its decision on the appeal, reversing both the District Court's award of summary judgment to Petitioner and the denial of summary judgment to Respondents on their Clean Water Act claim and remanding the case for further proceedings consistent with its decision. *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999), *reh'g* and *reh'g en banc denied*, 196 F.3d 1263 (1999). Following the Eleventh Circuit's denial of Petitioner's Motion for Rehearing En Banc on September 17, 1999, the District Court adopted the Eleventh Circuit's opinion in accordance with the Circuit Court mandate on January 5, 2000. Since the entry of the Circuit Court's mandate that Respondents' Motion for Summary Judgment on the Clean Water Act claim be granted, Respondents have requested that summary judgment be granted on Respondents' remaining state law claims and that a hearing be held before the appropriate trier of fact to determine civil penalties for Petitioner's Clean Water Act violations.

B. Statement Of Facts

Contrary to Petitioner's statement of facts, Respondents David and Barbara Driscoll are residents of Alpharetta, Georgia (in the Atlanta area) who also own approximately five acres in the North Georgia mountains bisected by the

Spiva Branch stream, which flows through a man-made pond before continuing onto Respondents Galbreaths' property. (R1-33-1, R2-35-1). Respondents Ruel and Patricia Galbreath own approximately two acres downstream of the Driscolls, also bisected by the Spiva Branch which forms a second similar pond before continuing on to the Nottely River. (R1-33-2, R2-35-1). Respondents purchased these properties in the early 1990s and utilize them as seasonal/ retirement homes due to the peaceful, clean quality of the property and the tranquil surrounding environment. (R1-1-3, R1-1-4). Prior to the commencement of land disturbing activities on Petitioner's property, the waters on Respondents' properties were clear and free of pollution, including sediment or eroded soils. (R2-40-55, R2-40-43, R2-40-47). Respondents have established through the use of a professional hydrologist that the Spiva Branch flowing through Respondents' properties is a perennial stream. (R2-40-39). At the time of the discharges, Petitioner owned approximately seventy-six acres, purchased in January, 1995, adjacent to, above, and upstream of Respondents' properties. (R1-9-1).

In March, 1995, Petitioner authorized subcontractors to clear his property of all timber to prepare the property for real estate development. (R2-46-3). Although Petitioner mistakenly states that this work was conducted under a silvaculture exemption, such an exemption does not apply where the re-cultivation of trees is not contemplated. *See Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344 (E.D.N.C. 1992). Indeed, this fact was recognized by the Superior Court of Union County which held in

Petitioner's suit against the local issuing authority[1] that the activities on Petitioner's property were clearly land disturbing activities. (R2-40-85).

During the clear-cutting of the timber on Petitioner's property, no erosion and sedimentation control Best Management Practices ("BMPs"), which are required for all land disturbing activities under the Georgia Erosion and Sedimentation Act of 1975, ("Georgia E&S Act") O.C.G.A. § 12-7-1, *et seq.*, were followed, despite ongoing discharges of eroded soils and sediment from the site. (R2-46-3, R2-40-93). BMPs are requirements for construction practices and the use of structures specifically designed to manage water flow, to control and contain eroded soils and sediment on a given site, and to manage the discharge of such materials to keep them at minimal or undetectable levels. Approximately eight months later, in November, 1995, after clearing his land of all commercially valuable trees, Petitioner continued further activities directed toward the development of the parcel for residential real estate. (R1-33-2, R2-46-3). In addition, approved BMPs still were not installed to prevent the discharge of eroded soils and sediment. Indeed, Petitioner discarded tree stumps and other tree debris into the stream. (R2-46-3).

Respondents began noticing significant amounts of pollutants in the stream and ponds in the early spring of 1996. (R2-40-44). Greatly concerned about the growing amount of pollution in the water, Respondents reported the damage to the appropriate State agencies in April, 1996. (R1-1-8). Meanwhile, Respondents hired an environmental consultant in May, 1996, who measured approximately 52 cubic yards (roughly 64 tons or 128,000 pounds) of sediment deposited into the ponds as a result of Petitioners' activities, as well as

1. *Adams v. Gooch & Union County*, Civil Action Number 96-CV-378-HS, Superior Court of Union County, Judge Hugh W. Stone. (R2-40-83), dismissed on the County's Motion to Dismiss. (R2-40-88).

an additional two to three cubic yards deposited in the stream up gradient of the ponds. (R2-44-10, R2-44-15).

Respondents also hired another expert consultant who specialized in erosion and sedimentation control. He reviewed the properties in July, 1996, December, 1996, and August, 1997 and recorded similar eroded soil and sediment deposits as well as an ongoing failure to implement proper BMPs on Petitioner's property. (R2-40-38 through 39). For example, that expert observed land disturbing activities on slopes ranging from 20 to 60 degrees and along the stream banks without the use of BMPs. (R2-40-39). No BMPs or other measures were in place to prevent discharges of eroded soils and sediment discharging from pipes and drainage ditches. (R2-40-38). Tree tops, dirt, rock and other debris were dumped into the steam. (R2-40-38, R2-40-93, R2-40-96). Moreover, Petitioner constructed an illegal rock check dam in the streambed itself which collected eroded soils and sediment before allowing them to continue downstream. (R2-40-40).

Refusing the proffered advice of several State regulatory agencies, Petitioner did not implement any approved BMPs on his property to control the pollutants being discharged, (R1-1-8), although he did install several pipes in the stream and continued grading activities. (R2-46-4). Contrary to Petitioner's statements, Petitioner did not obtain an approved Erosion and Sedimentation Control Plan for a local land disturbance permit until February, 1997, twenty-three months after land disturbing activities began and several months after this suit was filed. (R2-46-5). Yet, even after this approval, granted in the midst of Petitioner's suit against the local issuing authority, Petitioner continued to discharge eroded soil, rock, sand, sediment, debris, and other pollutants into waters of the

United States which flow through Respondents' properties. (R1-33-2). In fact, Petitioner admitted in sworn deposition testimony that BMPs were not implemented on his property, (R6-90), and that he discharged eroded soils and sediments into the stream and down onto Respondents' properties. (R6-102, R2-46-4). Even as late as August, 1997, the last time Petitioner's property was inspected by Respondents, it was evident that proper BMPs still were not being implemented or adequately maintained where they did exist. (R2-40-40). As a result, pollutant discharges were still continuing from Petitioner's property and the site still had yet to be stabilized. (R2-40-40). Such discharges of pollutants significantly diminish the stream's aesthetic value and significantly hinder the ability of stream vegetation, fish, and other organisms to survive by raising the water temperature and covering the stream and pond beds with layers of sediment. (R2-44-6, R2-44-11). As a tributary of the Nottely River, the Spiva Branch is classified as a primary trout water under Ga. Comp. R. & Regs. r. 391-3-6-.03(14)(b).

Although Respondents repeatedly advised Petitioner of the adverse impacts of his activities, Petitioner never obtained a National Pollution Discharge Elimination System ("NPDES") discharge permit as required by the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Georgia Water Quality Control Act, O.C.G.A. § 12-5-1, *et seq.* (R6-106). Under the Clean Water Act, 33 U.S.C. § 1342, permit issuing authority is delegated to the State of Georgia pursuant to the Georgia Water Quality Control Act. Under the authority of both of those Acts, Georgia issues NPDES permits for discharges of pollutants from point sources, including storm water discharges. Although Petitioner apparently submitted a Notice of Intent to be covered under Georgia's NPDES general storm water permit for his construction development

activities in September, 1996, (R2-46-31), this submission was made one and a half years after beginning land disturbance activities and long after the discharges began. (R6-95).

Petitioner never obtained an individual NPDES permit for stormwater discharge or any other point source discharge NPDES permit then available, (R6-106). Nor did Petitioner ever implement proper BMPs, (R6-90, R2-50-6), or otherwise make any effort to prevent the discharge of pollutants in violation of the Clean Water Act. (R2-50-5 through 6). As a result, Petitioner has discharged eroded soils, sediment, rock, sand, debris and other materials defined as pollutants by 33 U.S.C. § 1362(6) into the waters of the United States which flow through Respondents' properties. (R6-102, R6-105).

Petitioner has stated that he offered to clean up the damages caused by his activities but was rebuffed by Respondents. Although such an offer of compromise may not be considered at trial, Respondents unfortunately must address here Petitioner's misleading portrayal of this "offer." In truth, Petitioner offered to clean out Respondents' ponds with his septic tank equipment, but he refused to allow the remediation work to be undertaken by a professional. In addition, Petitioner refused to address the underlying sources of pollution on his property. Finally, Petitioner made the unconscionable demand that Respondents make false statements to government regulatory officials to assist Petitioner in avoiding an enforcement action. As a result, Respondents could not accept Petitioner's offer. Respondents' subsequent offers to settle this matter were flatly rejected.

REASONS FOR DENYING THE WRIT

Petitioner has identified no valid reasons for granting his requested Writ of Certiorari. He has failed to identify any conflicts in the Circuits on the issues in the case at bar. Nevertheless, Respondents will address and refute each of the issues raised by Petitioner.

I. The Federal Courts have jurisdiction to apply the Clean Water Act's base effluent standard found in 33 U.S.C. § 1311 where Petitioner discharged a pollutant into waters of the United States without a permit.

Clean Water Act § 1311 absolutely prohibits the discharge of any pollutant into waters of the United States from any source except where a valid Clean Water Act permit has been obtained. 33 U.S.C. § 1311; *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 310-311 (1981); *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). Congress provided potential dischargers with a very simple choice: either obtain a permit and comply with the terms of the permit or do not discharge pollutants. Moreover, 33 U.S.C. § 1365(f) clearly states, that for the purposes of citizen's suits under that section, ". . . the term 'effluent standard or limitation under this chapter' means (1) . . . an unlawful act under subsection (a) of section 1311 of this title." Section 1365(f) goes on to include other effluent standards or limitations set by other sections of the Act or within permits (usually by the agency). 33 U.S.C. § 1365(f). Thus, it is clear that the violation of § 1311 pollution prohibition constitutes a violation of an "effluent standard or limitation under this chapter."

Indeed, it is well settled under Clean Water Act case law that § 1311's pollution prohibition is an effluent standard which may be enforced through a citizen's suit. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 519 U.S. 811, 117 S. Ct. 57 (1996); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1993), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1128 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). Indeed, *Sierra Club, Lone Star* held that citizen's suits for discharging pollutants without a permit are allowed where no such limitation was in place.[2] Therefore, it is clear that 33 U.S.C. § 1311 is itself an enforceable effluent standard which can be met by *either* obtaining a qualifying permit *or* by not discharging pollutants in the first place.

Before the Eleventh Circuit, Petitioner argued that 33 U.S.C. § 1311 cannot be an enforceable effluent standard unless set by an administrative agency. However, this assertion is incorrect. The power of the administrative agency to administer federal statutes and to prescribe rules and regulations is not the power to make law, but rather to adopt measures that effectuate the will of Congress as expressed by statute. *Legal Environmental Assistance Found., Inc. v. U.S.E.P.A.*, 118 F.3d 1467 (11th Cir. 1997), *citing Dixon*

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2. *See, e.g., Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2nd Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991); *Menzel v. County Utils. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983); *Washington Wilderness Coalition v. Helca Mining Co.*, 870 F. Supp. 983, 986 (E.D. Wash. 1994); *Hawaii's Thousand Friends, Life of the Land, Inc. v. City and County of Honolulu*, 806 F. Supp. 225, 230 (D. Hawaii 1992); *Hudson River Fisherman's Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1050 (S.D.N.Y. 1988).

v. United States, 381 U.S. 68, 74 (1965). The first question which must be addressed is whether Congress has spoken to the issue at hand. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If the intent of Congress is clear, that is the end of the matter; the Court and the agency must give effect to the unambiguously expressed intent of Congress. *Id.* Indeed, the starting assumption is that Congress said what it meant when drafting legislation. *United States v. LaBonte*, 520 U.S. 751 (1997). It is hard to imagine a clearer expression of Congressional intent than that found in 33 U.S.C. § 1311: no discharge except pursuant to a permit under the Act. In passing 33 U.S.C. § 1311, Congress enacted a law which agencies strive to work within and which the courts enforce. As such, Respondents have not sought the creation of a new standard. The standard has existed since the Clean Water Act was created by the 1972 Amendments to the then existing Federal Water Pollution Control Act.

Moreover, in addition to Petitioner's steadfast refusal to acknowledge the clear statutory language and relevant case law establishing 33 U.S.C. § 1311 as an enforceable effluent standard, Respondents also note that Petitioner has failed to meet the effluent standard found at Ga. Comp. R. & Regs. r. 391-3-6-.03(5)(d). That effluent standard was promulgated under the Georgia Water Quality Control Act, O.C.G.A. § 12-5-1, *et seq.*, which implements the Clean Water Act at the state level. Georgia's Water Quality Rules mandate the following turbidity standard:

> All waters shall be free from turbidity which results in a substantial visual contrast in a water body due to a man-made activity . . . For land disturbing activities, proper design, installation, and

> maintenance of Best Management Practices and compliance with issued permits shall constitute compliance with Paragraph 391-3-6-.03(5)(d).

Ga. Comp. R. & Regs. r. 391-3-6-.03(5)(d). Respondents submitted ample evidence in the courts below demonstrating the discoloration of the waters of the United States flowing through their properties (R2-40-58 through 60) and Petitioner's failure to follow proper BMPs. (R1-1-8, R6-90, R2-50-6). Under *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1581-82 (N.D. Ga. 1995), a Clean Water Act citizen's suit can be brought for a violation of Georgia Water Quality Regulations promulgated pursuant to the Clean Water Act's delegation to Georgia. Therefore, there is an administratively promulgated effluent standard, in addition to 33 U.S.C. § 1311, which Petitioner has violated in the case at bar.

II. The Eleventh Circuit correctly determined the Spiva Branch stream to be waters of the United States under the Clean Water Act.

Petitioner has tried to mischaracterize the case at bar as unrelated to any waters of the United States; however, this is not true. Petitioner apparently believes that only public waters are subject to regulation and that the only public waters in this country are those found within public lands. However, it is clear that the definition of waters of the United States is not that restrictive. Indeed, the stated policy of the Clean Water Act is ". . . to restore and maintain the chemical, physical and biological integrity of *the Nation's waters*." 33 U.S.C. § 1251(a) (emphasis added). Yet, the determinative factor as to whether the waters at issue here are susceptible to regulation under the Clean Water Act is whether the waters in question are waters of the United States.

The Clean Water Act applies to navigable waters, 33 U.S.C. § 1251, which are defined under the Act as the waters of the United States. 33 U.S.C. § 1362(7). The definition includes any watercourse which flows in a watershed system which eventually becomes navigable, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974), or which has an effect on interstate commerce. *Hoffman Homes, Inc. v. Administrator, U.S.E.P.A.*, 961 F.2d 1310, 1319 (7th Cir. 1992). In the Eleventh Circuit, these holdings are followed by *United States v. Eidson*, 108 F.3d 1336, 1340 (11th Cir. 1997), *cert. denied*, 522 U.S. 899 (1997), and, *cert. denied*, 522 U.S. 1004 (1997), which dealt with pollutant discharges into a storm water drainage ditch which eventually flowed into Tampa Bay. In *Eidson*, the Court held that tributaries, including canals and storm drains, of navigable waters and waters affecting interstate commerce, have long been recognized as falling within the ambit of "waters of the United States." *Id.* at 1342. Moreover, the Court held that even intermittent tributaries qualify as "waters of the United States" if the water can eventually find its way into navigable waters. *Id.*

Here, there is no question that the waters at issue are waters of the United States. The record contains a United States Geological Survey topographic map showing the stream which originates on Petitioner's property to be a tributary of the Nottely River which itself flows into the Tennessee River after crossing the Georgia-Tennessee state line and thence eventually to the Gulf of Mexico. (R2-40-76) Any tributary which eventually flows into navigable or interstate waters is covered under the Clean Water Act. *State of Georgia v. City of East Ridge, Tenn.*, 949 F. Supp. 1571, 1578 (N.D. Ga. 1996). Moreover,

although substantial amounts of sediments have settled in the Respondents' ponds, the waters in these ponds are constantly flowing down the course of the Spiva Branch into the Nottley River. Therefore, sediments being carried into these waters are also moving downstream with these waters. The receiving waters on Respondents' properties are themselves waters of the United States.

III. Private citizens, acting pursuant to the Clean Water Act's citizen's suit provisions of 33 U.S.C. § 1365, are entitled to summary judgment on the issue of Petitioner's liability for the discharge of a pollutant into waters of the United States where there is no genuine dispute of fact as to Petitioner's liability.

Petitioner's final argument is that it is not fair for a citizen to obtain summary judgment against Petitioner for violations of the Clean Water Act without a determination by a jury. Yet, Petitioner's argument fails for many reasons. First, Petitioner has waived the argument as he has never raised this argument until this Petition for Certiorari. Second, it is both lawful and constitutional for citizens to bring an action for violations of the Clean Water Act under 33 U.S.C. § 1365. Finally, an order of summary judgment where there is no dispute of fact is also a lawful, constitutional, and well-settled vehicle for adjudicating a dispute. Indeed, even though Petitioner has not yet been denied a jury trial on civil penalties, even in such an event, such a deprivation would not be a violation of his constitutional rights.

A. The Court should decline to review this issue because it was not litigated in the Courts below.

Petitioner's final issue, the appropriateness of summary judgment in lieu of a jury trial where there is no dispute of material fact on the issue of civil liability, has been raised for the first time in the instant Petition for Writ of Certiorari. Generally, when an argument or issue is raised for the first time on appeal, the Court will not decide those questions not raised or decided in the courts below. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 2877 (1976). *See, e.g. California v. Taylor*, 353 U.S. 553, 556-57 n.2, 77 S. Ct. 1037, 1039-40 n.2 (1957). Indeed, in *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719, 721 (1941), the Court reasoned that this rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues. . . . in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

In *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (1976), the Fifth Circuit Court of Appeals explained that the determination turns on the need for further factual development. In situations where further factual development would have occurred in the trial court had the new theory been presented there, it is inappropriate for the court to consider the new theory on appeal. Where, however, the new theory is a purely legal question, and no factual development is needed for its resolution, there is no unfairness in addressing the question on appeal. This is particularly true where "manifest injustice would result from ignoring the new legal theory." *Id.* at 768 n.10.

Here, although Petitioner's claim is purely legal and requires no further factual development, thereby satisfying the exception discussed by *Higginbotham*, there is no substantive validity to this claim. Thus, no manifest injustice would result if this issue was not considered by the Court. Additionally, Petitioner presents no reason why this legal theory could not have been raised before the Eleventh Circuit. Therefore, while the Court retains discretion to hear issues not raised below, Petitioner presents no valid reason for the Court to deviate from the standard rule.

B. 33 U.S.C. § 1365 authorizes private citizens to bring civil actions for violations of the Clean Water Act.

In the Clean Water Act, Congress clearly expressed a policy of encouraging and facilitating citizen participation in the Clean Water Act's enforcement, providing at 33 U.S.C. § 1251(e), that "[p]ublic participation . . . shall be provided for, encouraged, and assisted by the Administrator and the States." Such public participation is to be undertaken under the auspices of the citizen's suit provision found in 33 U.S.C. § 1365 and utilized by Respondents here. These citizen enforcement provisions were included in the Clean Water Act by Congress to ensure diligence on the part of the agency administering the Act by authorizing citizens to undertake enforcement where the Administrator is reluctant or unwilling to do so.

In the real world, an administrator cannot be everywhere at once since the allocation of resources will not permit it. Indeed, decisions concerning similar citizen's suit provisions under the Resource Conservation and Recovery Act ("RCRA") have recognized the important role that citizen's suits play in the federal environmental regulatory scheme as the agency must often selectively enforce its rules due to pressure on resources

and a need to get the "big" polluters first. *Sierra Club v. Chemical Handling Corp.*, 824 F. Supp. 195, 197-98 (D. Colo. 1993). "Indeed, a RCRA violation is only 'small' to one who does not live near the offending facility." *Id.* at 198. Thus, the Court held that the action was a testament to Congressional wisdom in including the citizen's suit provision. *Id.* Likewise, Clean Water Act violations are not small or otherwise unworthy of enforcement to those individuals who are forced to endure the consequences of the discharger's actions.

33 U.S.C. § 1365 allows any citizen to commence a suit against another person who is in violation of the effluent limitations required by the Clean Water Act. Such action is an enforcement action only. The plaintiffs themselves are not authorized to recover damages. *Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1016 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). Thus, the action taken by the Respondents here is on behalf of the United States which is otherwise authorized to commence the enforcement action through the agency. The enforcing agency has the primary authority where it chooses to exercise its jurisdiction. *Montgomery Envtl. Coalition Citizens Coordinating Committee on Friendship Heights v. Washington Suburban Sanitary Com.*, 607 F.2d 378 (D.C. Cir. 1979). However, where the enforcement agency does not act, the citizen is vested with the authority as a "private attorney general." *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp 207 (D. Conn. 1985); *Marathon Oil v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977) (holding that a citizen suit against the holder of a NPDES permit may be maintained even where EPA declines to prosecute on the ground that the violation was unavoidable).

Indeed, the Court explicitly approved of the citizen's suit provision in *Middlesex County Sewerage Authority v. National Sea Clamers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981), where the Court affirmed Congress's intent to provide qualifying individuals with a cause of action to enforce the provisions of the Clean Water Act as "private Attorneys General."

The action taken by the Respondents in this case was commenced under this provision in the absence of any action by other State or Federal agencies. That the action is "on behalf of the United States" is relevant only in the determination of who receives the civil penalties assessed against the defendant. As such, Respondents' action is constitutional and authorized by law.

C. Citizen plaintiffs are entitled to summary judgment on the issue of liability under the Clean Water Act where there is no genuine dispute of fact as to a defendant's violation of the Clean Water Act.

As with all civil actions brought in Federal court, the Federal Rules of Civil Procedure ("FRCP") determine procedural matters raised in this action. *See* FRCP 1. Moreover, FRCP 1 also requires that those rules ". . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Therefore, consistent with that clause of FRCP 1, FRCP 56 provides, in part, that a claimant may seek summary judgment where there are no "genuine issues of material fact." Indeed, "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2553 (1986). Moreover, partial summary

judgment may be granted by a *judge* on claims that are not in controversy, while those claims or issues for which a genuine controversy exists may be reserved for trial. FRCP 56(d). Furthermore, under the rule, this option may be exercised when liability is clear, but the extent of damages is in dispute. FRCP 56(c). Thus, summary judgment proceedings assessing liability against the petitioner without a jury are lawful under the Federal Rules of Civil Procedure.

In addition to being authorized by law, a grant of summary judgment in the absence of a jury determination is also constitutional. "[I]n ordinary litigation, the Seventh Amendment does not require a jury trial where there are no facts in dispute. . . ." *Coleman v. Commissioner of Internal Revenue*, 791 F.2d 68 (7th Cir. 1986); *See also Sullivan v. United States*, 788 F.2d 813, 816 (1st Cir. 1986). Of course, where there are genuine issues of material fact in dispute, summary judgment is inappropriate and those factual disputes must be resolved by a jury or similar trier of fact. *See Narramore v. United States*, 852 F.2d 485 (9th Cir 1988) (holding that summary judgment was inappropriate where there was a question of fact as to whether the flooding onto the plaintiff's land exceeded the level allowed under a flowage easement).

Nevertheless, an issue of fact is considered "genuine" "if the record as a whole could lead a reasonable trier of fact to find for the nonmoving party." *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). A party opposing a motion for summary judgment must set forth specific facts to show that the issue is genuine. The party cannot simply rely on the allegations

of its pleadings. *Anderson*, 106 S. Ct. at 2510. An issue is "material" "if it might affect the outcome of the case under the governing law." *Anderson*, 106 S. Ct. at 2510; *Redwing Carriers, Inc*, 94 F.3d at 1496; *Allen*, 121 F.3d at 646. Irrelevant or unnecessary factual disputes will not prevent the grant of summary judgment. *Anderson*, 106 S. Ct. at 2510. The burden of showing that there is no genuine issue of material fact initially rests with the party moving for summary judgment. *Celotex Corp.*, 106 S. Ct. at 1553. In establishing this, all facts are taken in the light most favorable to the non-moving party. *Allen*, 121 F.3d at 646. Once this burden has been met, the burden then shifts to the non-moving party. *Id.* At that point, the non-moving party must show that genuine issues of material fact do exist. *Id.* "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 106 S. Ct. at 2511.

Here, there is no question that there were no genuine issues of material fact regarding the issue of liability. Indeed, even the District Court could not find any dispute of fact regarding Petitioner's liability, although that Court did incorrectly apply the governing law. The Eleventh Circuit's grant of summary judgment under the correct interpretation of the applicable law was appropriate. Because there were no disputes as to the facts which determine Petitioner's liability, the Court was able to make that determination as a matter of law without depriving Petitioner of any Seventh Amendment right to a trial by jury.

Indeed, the conclusion here that summary judgment is appropriate for determining Petitioner's liability is consistent with the Supreme Court's holding in *Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831 (1987). There, the Supreme

Court addressed the issue of whether the Seventh Amendment required a trial by jury for a claim brought by the United States against a real estate developer under the Clean Water Act. After review of the facts there, the Court held that in that instance a determination of liability necessitated a jury trial under the Seventh Amendment, *Id.* at 420, 425, as it was undisputed that there were genuine issues of material fact unresolved. *Id.* at 415. However, the Court clearly stated that the requirements of a jury trial are **not** applicable where there are no facts in dispute. *Id.* at 419 (*citing Hepner v. United States*, 213 U.S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909)).

In addition, even though Petitioner has not been denied a hearing or trial on the assessment of civil penalties for his violations of the Clean Water Act, the Court in *Tull* held that a jury trial was not required under the Seventh Amendment for the determination of the extent of damages imposed. *Id.* at 426-27. Notably, the Court recognized that Congress did not provide for such a right in enacting the Clean Water Act. *Id.* at 425. Rather, such calculation may be determined by a judge. *Id.* at 427. Thus, in the case at bar, there is no issue for determination regarding Petitioner's entitlement to a jury trial.

IV. The Court should decline to review because there are no conflicts in the Circuits and the issues presented by Petitioner are not sufficiently important to warrant the Court's review.

Petitioner has stated in his Petition for Writ of Certiorari that review is warranted to correct a conflict in the Circuits. However, as stated before, Petitioner has failed to identify that conflict. In fact, there is no conflict created by the

Eleventh Circuit's decision in the case at bar. Prior to the decision in the Circuit Court here, the only applicable precedent in the Eleventh Circuit was *Hughey v. JMS Dev.*, 78 F.3d 1523 (11th Cir. 1996), *cert. denied*, 519 U.S. 993, 117 S. Ct. 482 (1996)[3], which created a narrow, four part exception to 33 U.S.C. § 1311's discharge effluent standard where (1.) compliance is impossible, (2.) no permit exists, (3.) standards mirroring proposed NPDES permit conditions are followed, and (4.) the discharges are minimal. This detailed test *must* be met before the holding of *Hughey* can be invoked. The lower court determined that this exception did not apply in the case at bar since few of the elements of the critical four-part test were met here. *See Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999). To the extent that any conflict ever existed, it was with the Fifth Circuit's decision in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 519 U.S. 811, 117 S. Ct. 57 (1996), handed down virtually contemporaneously with *Hughey*. However, the Eleventh Circuit in the case at bar took pains in its opinion to reconcile any conflicts between those two decisions and its holding in the case at bar, thereby eliminating any potential conflicts within the Circuits on these issues. *Driscoll*, 181 F.3d at 1290.

Before the Eleventh Circuit, Petitioner did cite to a number of cases stating that the Clean Water Act does not apply to stormwater regulation. However, other than *Hughey v. JMS Dev.*, Petitioner failed to cite to any cases decided after

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3. Respondents note that the Court denied the Petition for Writ of Certiorari in *Hughey v. JMS Dev.* on many of the same issues as those raised in the instant Petition.

the passage of the 1987 Amendments to the Clean Water Act which brought discharges of pollutants through stormwater under the Act's jurisdiction. When the Clean Water Act was initially enacted in 1972, Congress chose to exempt stormwater discharges in order to allow the Agency to address the then more serious problem of point source discharges. However, fifteen years later, as pollutant discharges within stormwater became more serious, Congress responded by enacting 33 U.S.C. § 1342(p), which created a NPDES stormwater discharge permit to address pollutants which may be discharged via stormwater. The grace period for meeting the requirements of the 1987 Amendments expired in 1993. 33 U.S.C. § 1342(p). Therefore, only cases decided subsequent to this date can be used to discuss NPDES stormwater discharge permits. However, the standard which governs this permit is the same as the original point source discharge permit: no pollution may be discharged except with a NPDES permit. 33 U.S.C. § 1311. Thus, there is no conflict within the Circuits here to be resolved.

Finally, Petitioner has argued that enforcing the Clean Water Act in this instance would not only be expensive for him, but would also detrimentally affect future enforcement of the Clean Water Act. Despite his emotional hyperbole and the invocation that he must be allowed to violate the Clean Water Act in order to preserve the sanctity of environmental law, Petitioner has not raised any issues which are of sufficient importance to warrant the Court's review. Every legal issue raised by Petitioner is well-settled throughout the Circuits. Petitioner has not raised a novel issue or an instance where the lower Court's application of law to the facts of the case are out of line with existing precedents. In truth, Petitioner's real complaint here is that he is not satisfied with the Circuit Court's adverse opinion. However, mere personal dissatisfaction with a properly rendered decision does not give rise to an issue worthy of this Court's review.

CONCLUSION

In the case at bar, Petitioner has offered no legitimate issue which warrants the Court's review. As demonstrated above, each issue raised in the Petition for Writ of Certiorari is well-settled law. Moreover, Petitioner has failed to show that there is any conflict within the Circuits or that the issues raised are of sufficient importance to merit review by the Court's review. As such, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-1415

In The
Supreme Court of the United States

ROSS ADAMS,
Petitioner,

v.

DAVID & BARBARA DRISCOLL,
RUEL & PATRICIA GALBREATH,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITIONER'S REPLY BRIEF ADDRESSED TO NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

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12 pp

In the interest of truth, the petitioner wishes to begin by stating his absolute apologies to the court for reporting in error in his petition for a writ of certiorari that the Driscoll's were residents of Florida. The petitioner assumes that counsel for the respondents correctly reported that the Driscoll's are from Alpharetta, Georgia, rather than Florida. Minor detail, but the petitioner believes it is important to get the facts straight.

The petitioner furthermore wishes to declare to the court the absolute truth and correctness of every other statement made in his original petition to the court. He furthermore wishes to dispute the claims of counsel for the respondents on a point by point basis, perhaps ending this fruitless conflict that, in all probability, resulted from a lack of communication between parties. It is quite inconceivable to the petitioner that the suit would have escalated to this level, and it is unfortunate that it has done so. These remarks are given candidly—dosed with the common sense and reason.

The first and most important point that the petitioner begs the court consider is that the facts are still in dispute in this case. Since truth seems to be a matter of perspective to respondents' counsel, the petitioner wishes to submit evidence to the court that clearly indicates that the facts are still in dispute, which would therefore entitle the petitioner a right to a trial by jury under the law.

In essence, counsel for the respondents alleges in his brief in opposition that the petitioner broke the law and is therefore should be punished. This is obviously reported in error. If the petitioner broke the law, why is it that no fines have ever been levied against him by any local, state or federal environmental authority? Why has he not been punished by a local, state or federal agency? As evidence for consideration, the petitioner wishes to submit a letter—from Molly P. Aldridge, Erosion & Sedimentation Control Officer for Union

County, State of Georgia:

Aldridge: "In mid-February, 1997, I became employed by Union County Commissioner Harold Cook as an Erosion & Sedimentation Control Officer. On 2-21-99, Commissioner Cook brought me an approved Erosion & Sediment Control Plan on this site to issue a Land Disturbing Permit. The plan had been approved by the Blue Ridge Mountain Soil & Water Conservation District. It had been signed by Jim Carey, District Conservationist USDA-NRCS. At the time, I did not even know where the site was much less the history of it. As I investigated this site I found there was some problems in the past. I met with Mr. Adams to explore ways to stabilize the site. He began to hydro-seed all disturbed areas. This had to be repeated several times to obtain a good cover. Sediment basins have been cleaned out through maintenance as required. Silt fences were installed in the beginning to help control the escape of sediment. Rip Rap has been placed in portions of the ditches. The grading on the site had taken place prior to my working with Mr. Adams to stabilize it. Over the course of time spanning between 2-21-99 and present date I have not observed any major additional grading by Mr. Adams. The grading I have seen take place has been by single family residences through individual lots that have been purchased. Since the time I began working with Mr. Adams, he has shown good faith if during a site visit a problem was found to work to correct it. I, as an independent contractor, have provided services to Union County for the implementation and enforcement of the Erosion and Sedimentation Control Ordinance from November 15, 1997 to present date."

This letter indicates that the petitioner was in good faith compliance with the rules set forth by the environmental authorities he knew. In fact, Ms. Aldridge's letter seems to indicate that the petitioner was cooperating—fully and immediately—with directions given to him by county authorities as they were issued. And he, with no other

worker employed to help him, implemented these erosion control measures Ms. Aldridge informed him of.

It was therefore quite a surprise to the petitioner to see the following statement in the respondents' brief stating that "the petitioner made the unconscionable demand that respondents make false statements to government regulatory officials to assist petitioner in avoiding an enforcement action." Reason dictates that this is incorrect: The petitioner clearly complied with directions given to him by government regulatory authorities, so there was obviously no need to hide or conceal anything as counsel for the respondents suggests. The petitioner declares and protests that he would never, never violate the law. As Ms. Aldridge's statement exemplifies, the petitioner made every attempt to fully comply with the issues brought to his attention by authorities. This is the fact that should be considered in this matter: No enforcement action has ever been taken against the petitioner—ever. The petitioner supposes this allegation on behalf the respondents is either a misperception of the petitioner's intentions or a flat falsehood planted deliberately to destroy the petitioner's character in the eyes of the court. But this is simply the petitioner's opinion of the matter. It is necessary to return issue at hand: Are the facts in dispute?

Rulings by two lower courts in favor of the petitioner and a ruling by Eleventh Circuit in favor of the respondents reasonably indicates that the facts are still in dispute. The petitioner also wishes to state that he complied with best management practices and obtained all required permits, when they were available to him. An NPDES permit has never been issued in the state of Georgia.

There are many statements in respondents brief of opposition that the petitioner finds issue with, but the most important issue is yet to be discussed: Why does respondents' counsel seem to be trying to

keep this case from going to trial? Is respondents' counsel wanting to collect a large sum of attorneys' fees maybe?

This second issue the petitioner wishes to discuss is of great importance. Contrary to the claims of respondents' counsel, court documents state that the petitioner has never waived his right to a trial by jury. In fact, he has requested it all along because there would be a lot to loose if this case ever went to trial, with a fair and impartial jury to evaluate the alleged "pollution" of the Driscolls' and Galbreaths' ponds. In fact, a photograph taken of one of the ponds in its "polluted" state seems to indicate that the aesthetic value (the value for which the respondents are suing) has been retained.

But even if the respondents are not satisfied with the condition of their ponds, the petitioner has offered—and still offers—to repair the ponds with his equipment (not septic tank equipment as respondents' counsel suggests). The fact that counsel does not know or understand that this equipment is not septic tank equipment is indicative of the fact that respondents' counsel is unfamiliar with professional development equipment used to build roads and make room for homes.

It is unfortunate that the Driscoll's and Galbreath's purchased land near a private piece of property that could be bought sold and developed. But it is the inevitable right of all Americans to purchase and enjoy land in the north Georgia mountains. National forest land borders the petitioner's property, so the land is even more beautiful and precious to the people who now live there. The Driscoll's and the Galbreath's still enjoy it too; they have not sold their property or relocated.

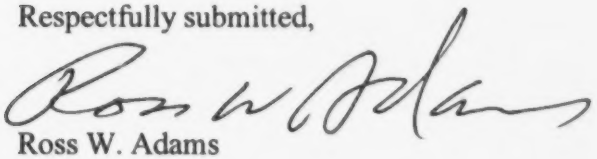
The petitioner apologizes to the court that he has no formal legal training to aid him in citing conflicts in the lower courts that would

justify a Supreme Court hearing in this case. But he does claim something of national importance: If we deny a common man his right to a trial by jury in a case where the facts are still in dispute, we degrade the law by denying rights guaranteed to him under the United State Constitution.

If respondents' counsel is allowed to set precedent with this case, then the petitioner fears that a string of injustices will occur that will further retard efforts to properly enforce the Clean Water Act. The Clean Water act was established to protect the waters of the United States from pollution—namely chemical and industrial waste, fertilizers and pesticides. The Clean Water act does not, and should never been applied in this case. It is nothing more than an attempt to extort money out of the petitioner, not a genuine commitment to environmental protection. *If this case was about environmental protection, respondents' counsel would let it go to trial.*

Therefore, the petitioner respectfully requests a trial-by-jury to settle this case, due to the large amount money respondents' and counsel are requesting of the petitioner and due to the fact that the facts are still in dispute. The petitioner duly declares before this court that he will be satisfied with a trial—whatever the outcome may be.

Respectfully submitted,



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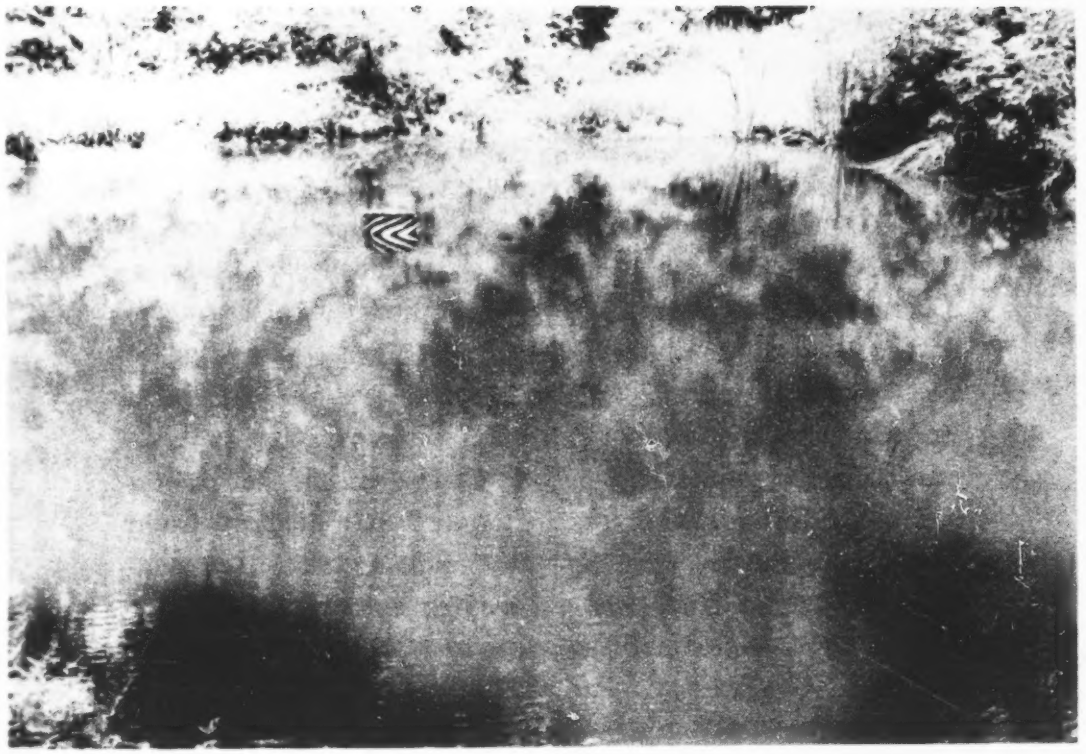
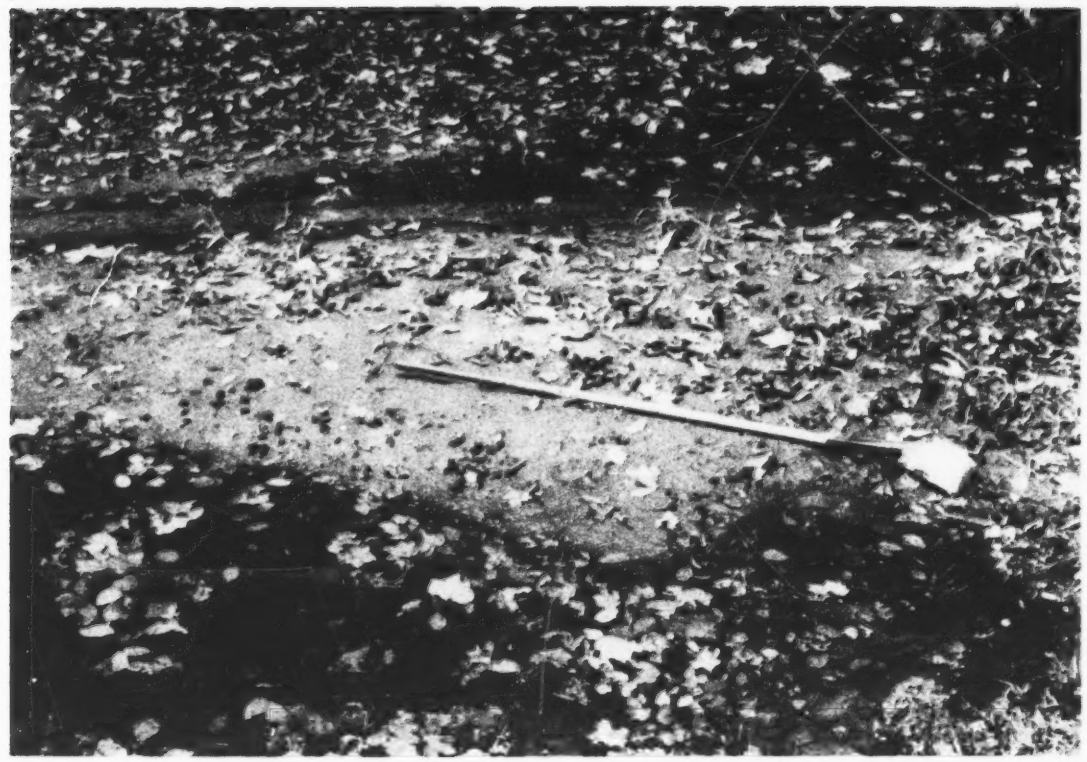
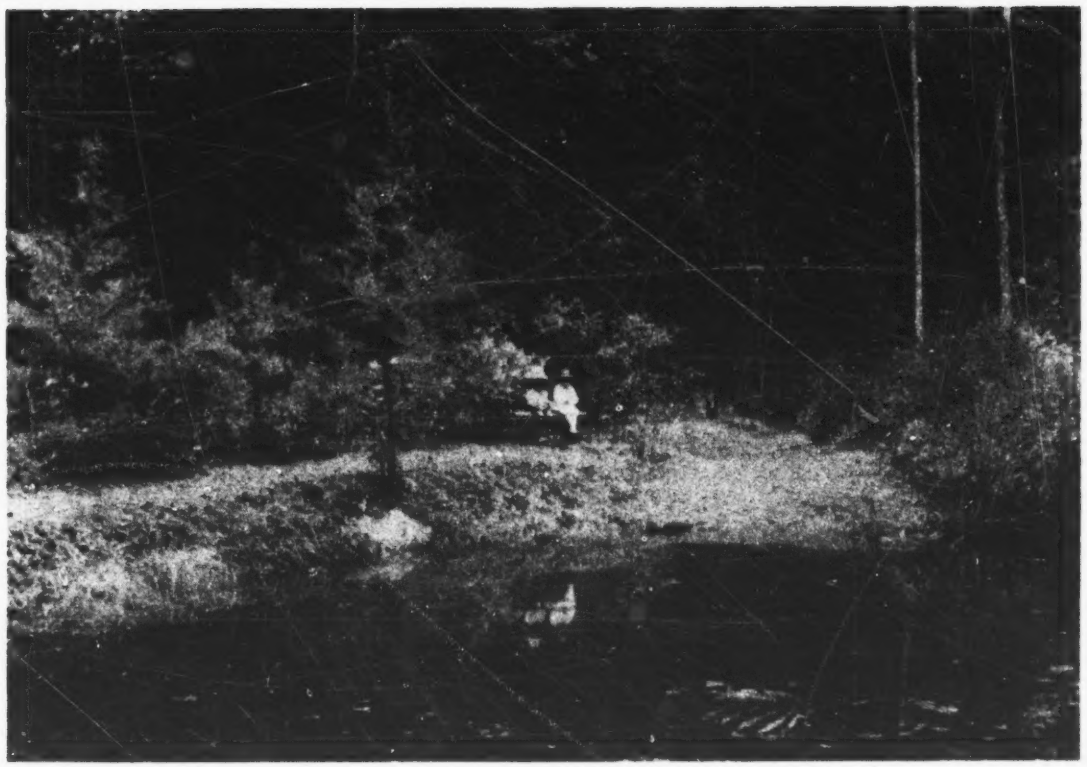


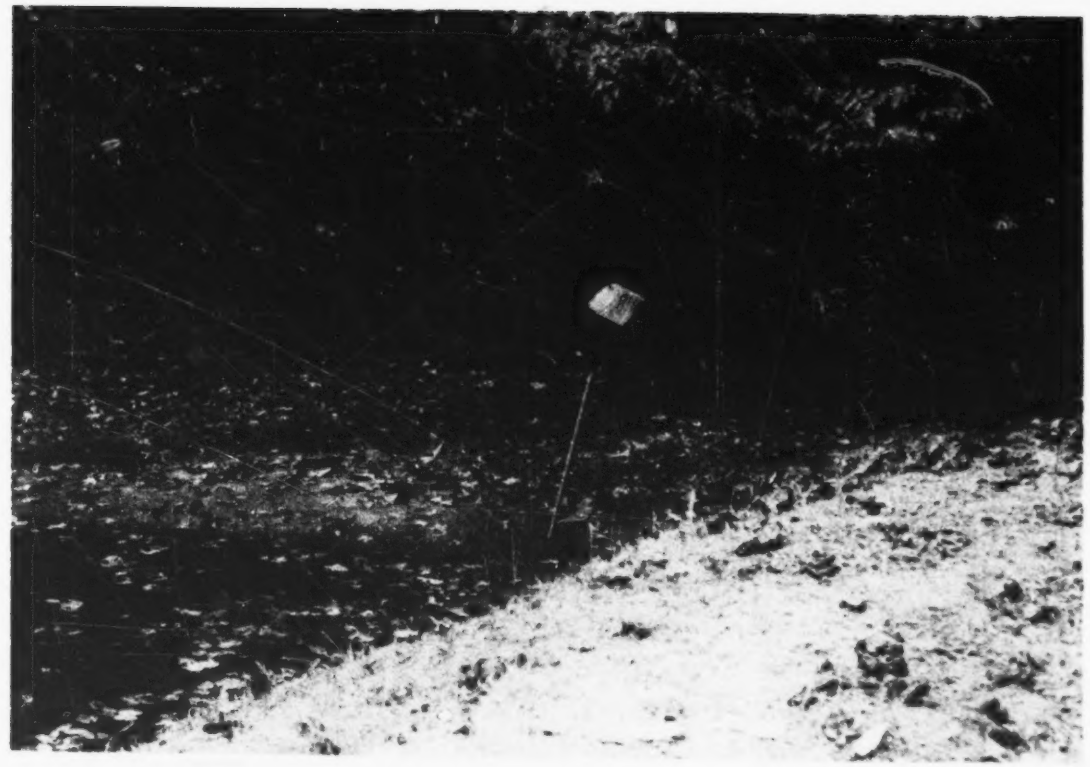
Picture Number 1 shows how small the Driscoll's pond is.



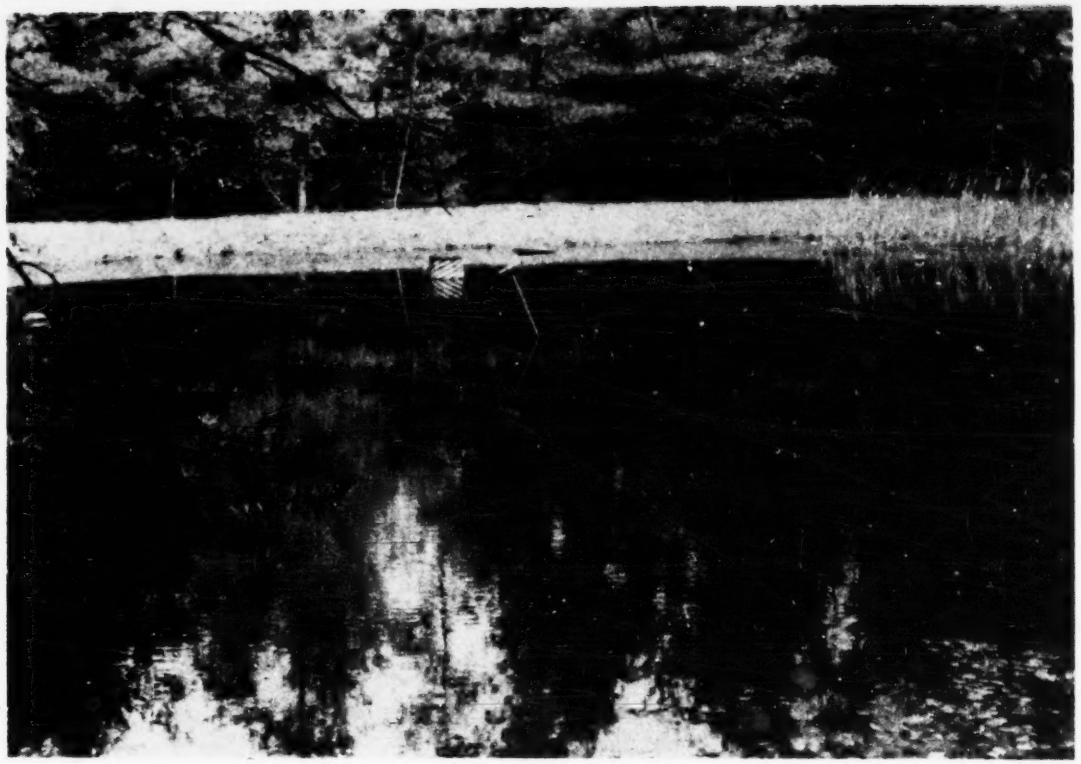
This picture shows the deposit of sediments in the upper end of the first pond (Driscoll's pond) in relation to a broom.



Picture 3 speaks for itself.



The broom is on the bottom of the pond.
The deposits that settled here are not significant.



This is the second pond (Galbreath's pond).
Deposits would have to fill up both ponds before they could continue downstream to U.S. waters.

Second view of depth of main deposits of sediments in the first pond. The deposits are minimal.